COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

15-P-1304

THOMAS W. PETERS

vs.

SHAW'S SUPERMARKETS, INC. & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A jury returned special verdicts in favor of the defendants, Shaw's Supermarkets, Inc. (Shaw's) and Banco Santander (Santander), on a claim for negligence brought by Thomas W. Peters after Peters injured his ankle in the Shaw's parking lot while making a delivery to Santander. On appeal, Peters contends that there was reversible error with respect to five jury instructions. We affirm.

1. Duty. During the course of the judge's charge on duty and open and obvious danger, the jury were instructed that "a person in control of the premises is not required to supply a place of maximum safety, but only one which would be safe to a person who exercises such care as the circumstances would reasonably indicate." Peters contends that the instruction, to

[1] Banco Santander.

which timely and cogent objection was made at trial, is error because it blurs the distinction between the defendant's duty and the plaintiff's comparative negligence.

"We review objections to jury instructions to determine if there was any error, and, if so, whether the error affected the substantial rights of the objecting party." Dos Santos v. Coleta, 465 Mass. 148, 153-154 (2013), quoting from Hopkins v. Medeiros, 48 Mass. App. Ct. 600, 611 (2000). The reference to "a person who exercises such care as the circumstances would reasonably indicate" is a relic of the contributory negligence era. See Gadowski v. Union Oil Co., 326 F.2d 524, 525 (1st Cir. 1964). The instruction has the potential to import consideration of the plaintiff's negligence into the jury's consideration of duty, and should not have been given. See Dos Santos v. Coleta, supra at 157-158, 159 ("[A] landowner is not relieved from remedying [an open and obvious] danger where he knows or has reason to know that lawful entrants may not heed the warning for a variety of reasons, including their own failure to exercise reasonable care. . . . A plaintiff's own negligence in encountering the danger does not relieve the landowner of a duty to remedy that danger where the plaintiff's negligent act can and should be anticipated by the landowner").

We therefore turn to whether the error in this one portion of the instruction affected the substantial rights of the

objecting party. The judge otherwise properly instructed the jury in accordance with Dos Santos, supra. The jury were told that the defendants were "not necessarily relieved of the duty of reasonable care to take further action simply because the danger was open and obvious. This duty may require the Defendant to warn a person about the danger and to remedy it and/or to take other steps to protect him against the known or obvious condition or activity if . . . the person in control has reason to expect that a person lawfully on the property would nonetheless suffer physical harm. Such reason may rise when there is a reason to anticipate that a person's attention may be distracted so you will not discover what is obvious, or may forget what he has discovered[,] or may fail to protect himself against it." See id. at 163; Restatement (Second) of Torts § 343A comment f (1965). The judge's complete and accurate instruction on comparative negligence further mitigated the error.

It is also noteworthy that this was not a case where the jury received a special question on duty. The jury did receive special jury questions regarding breach of duty, questions which clearly separated consideration of the defendants' negligence from that of Peters'. The jury were told to consider first whether the defendants were negligent, and reach the question of comparative negligence only if they found either of the

defendants negligent. The jury found no negligence, that is no breach, not a lack of duty.

Furthermore, the Shaw's manager testified that he understood that Shaws had a duty to repair the parking lot, but did not fill potholes in midwinter because "quite honestly, [a patch] would not last in that hole."[2] Peters himself testified that the lot was typically "a mess[,] [t]here was [sic] a lot of holes in that lot." In view of this testimony, coupled with the jury's finding that there was no breach of duty, we must conclude that the error in the one portion of an otherwise valid instruction on duty did not affect the substantial rights of the plaintiff. See Quinn v. Mar-Lees Seafood, LLC, 69 Mass. App. Ct. 688, 701-702 (2007).

2. Rules, policies, customs, or practices. Peters requested the following jury instruction: "A company's failure to comply with its own written or unwritten rules or policies or customs or practices intended to protect the safety of third persons, is evidence of the company's negligence." The judge declined to give it, and Peters objected.

"The trial judge maintains discretion in charging the jury, and a charge is to be read as a whole in determining whether the jury were properly instructed." Ventresco v. Liberty Mut. Ins.

[2] He further testified that a cold patch would last only a week or two, but that a cone was a cheap and easy method of marking the spot.

Co., 55 Mass. App. Ct. 201, 206 (2002), quoting from Sarvis v Boston Safe Deposit & Trust Co., 47 Mass. App. Ct. 86, 100 (1999). Evidence of the defendants' policies, customs, and practices was admitted at trial, and the parties argued them to the jury. The judge fully instructed the jury on the reasonable person standard and the duty of care. "Every possible correct statement of law need not . . . be included in jury instructions if the instructions as given are correct and touch on the fundamental elements of the claim." Kobayashi v. Orion Ventures, Inc., 42 Mass. App. Ct. 492, 503-504 (1997). There was no abuse of discretion in omitting the requested instruction.

3. Nondelegable duty. Peters requested a jury instruction explaining that the duty of care arising from the possession of the premises is a nondelegable duty. Peters argues that the omission of the instruction was error because "[i]t was important for the jurors to understand . . . that consideration of negligence on the part of Shaw's would include consideration of the acts or omissions of its subcontractors in relation to the hole that caused . . . Peters' injury." While there was evidence in the record that Shaw's hired an independent contractor to remove snow from and sweep its parking lot, the defendants did not dispute at trial that Shaw's remained responsible for the maintenance and condition of the lot. The

judge's instructions on duty, as given, were proper. See Barbosa v. Hopper Feeds, Inc., 404 Mass. 610, 615-617 (1989); Quinn v. Mar-Lees Seafood, LLC, supra.

4. Third-party beneficiary instruction. Peters requested, and the judge omitted, the following instruction: "a defendant under a contractual obligation is liable to third persons not parties to the contract who are foreseeably exposed to danger and injured as a result of its negligent failure to carry out that obligation." The requested instruction was based on Shaws' status as the commercial lessee that shouldered the burden of parking lot maintenance under the lease. Although this instruction was not given in the terms requested by Peters, the instructions given by the judge made clear that Shaw's "ha[d] a duty to maintain the property in a reasonably safe condition for all persons lawfully on the premises." "[A] judge is under no obligation to charge the jury in the specific language requested by a party." Hoffman v. Houghton Chem. Corp., 434 Mass. 624, 639 (2001), quoting from Corsetti v. Stone Co., 396 Mass. 1, 14-15 (1985).

5. Commercial tenant instruction. Peters requested that the judge instruct the jury as follows with respect to Santander's duty as a commercial subtenant of Shaws.

> "A commercial tenant has a duty to protect its visitors, either to warn or to make repairs, even where its landlord retains control of some portion of the common area, if the

> tenant is or should be aware of the unsafe condition. In other words, a commercial tenant has a duty to its visitors and customers to provide for their safety in sidewalks, parking lots and other common areas even if control and maintenance responsibility is assigned by lease to the commercial landlord."

The judge omitted the instruction, which is a correct statement of law.[3] See Norfolk & Dedham Mut. Fire Ins. Co. v. Morrison, 456 Mass. 463, 470 (2010), and cases cited.

Peters contends that the omission amounted to a "refusal to instruct the jury on Santander's duty," which "left the jury no basis on which to consider any responsibility on the part of [Santander]." We disagree. While the judge's instruction on Santander's duty could have been more explicit, the remainder of the judge's instructions regarding duty made clear that the jury were to consider -- separate and apart from their consideration of Shaws -- whether Santander was negligent and whether its negligence was a substantial contributing cause of Peters' injuries. In answer to separate special questions, the jury determined that neither Shaw's nor Santander was negligent. The instructions as a whole adequately informed the jury of its responsibility to determine whether Santander was negligent in

[3] The instruction as drafted was overbroad to the extent that it assumed a duty to repair on the part of Santander. In his closing argument, Peters acknowledged that Santander had no duty to repair. The only issue that was before the jury was whether Santander negligently failed to warn. See Srebnick v. Lo-Law Transit Mgt., Inc., 29 Mass. App. Ct. 45, 51 n.3 (1990).

failing to warn of any danger of which it was aware or should have been aware. See Hoffman v. Houghton Chem. Corp., supra.

Judgment affirmed.

By the Court (Katzmann, Carhart & Sullivan, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: June 24, 2016.

[4] The panelists are listed in order of seniority.